LAW DING HOCK

v.

NG YOON LIN

HIGH COURT MALAYA, KUALA LUMPUR
TENGKU MAIMUN J
[SUIT NO: S4-22-58-2007]
12 NOVEMBER 2007

CIVIL PROCEDURE: *Striking out - Rules of the High Court 1980, O. 18 r. 19 - Whether competent for plaintiff to maintain case against defendant - Whether defendant held properties on resulting trust for plaintiff's benefit - Whether money given by plaintiff to circumvent bankruptcy status - Whether plaintiff successfully rebutted presumption properties given to defendant for own use*

LAW OF TRUST: *Resulting trust - Properties - Allegation of - Whether proved - Whether defendant held properties on resulting trust for plaintiff's benefit - Whether competent for plaintiff to maintain case against defendant - Whether plaintiff successfully rebutted presumption properties given to defendant for own use*

This was the defendant's appeal against the decision of the deputy registrar in dismissing the defendant's application to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 on the grounds that the claim was frivolous and vexatious and an abuse of the process of the court. Briefly, the plaintiff and the defendant had become romantically involved sometime in the year 1992. Thereafter, the defendant and plaintiff had lived together in a rented house for several years. In the late 1990s, the plaintiff had inherited RM2,064,437.90 from the estate of his deceased grandfather. However, the plaintiff at the time was an undischarged bankrupt. Upon the plaintiff's instructions, RM1,032,218.95 was credited into the account of the defendant and with this money three properties were purchased ('the properties') which were all registered under the name of the defendant. Sometime in 2005, the defendant walked out on the plaintiff. It was the plaintiff's case that the defendant held the properties on a resulting trust for his benefit, therefore he was a beneficiary under this resulting trust. The defendant's application to strike out the plaintiff's claim was premised on the ground that it was not competent for the plaintiff to maintain against the defendant as the money was given by the plaintiff to her as a gift

A out of love and affection and the properties belonged to her as she was the registered owner of the properties. The defendant further contended that if however the plaintiff gave her the money to overcome his inability due to his bankruptcy status, then the plaintiff had an illegal purpose and could not now enforce the
B illegal transaction.

Held (allowing defendant's appeal):

(1) The contemporaneous documents submitted herein lent support to the defendant's contention that the money was
C given by the plaintiff to circumvent his bankruptcy status. This court would not aid the plaintiff who clearly had wanted to deceive the Director General of Insolvency in not putting the money into his own account. The plaintiff had not rebutted the presumption that the properties were given to the
D defendant for her own use. (paras 6 & 11)

Case(s) referred to:
Hasmah Abdul Rahman v. Kenny Chua Kien Lam [2006] 2 CLJ 1029 CA ***(foll)***
E *Liew Choy Hung v. Fork Kian Seng [2000] 1 CLJ 369 HC* ***(refd)***
Tinker v. Tinker [1970] 2 WLR 331 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 38(1)
Rules of the High Court 1980, O. 18 r. 19

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For the plaintiff - Lam Sam Kit; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners
For the defendant - Jeremy Lee; M/s Thomas Philip

Reported by Suhainah Wahiduddin

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JUDGMENT

Tengku Maimun J:

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[1] Enclosure 19 is the defendant's appeal against the decision of the learned deputy registrar in dismissing the defendant's application to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 on the grounds that the claim
I is frivolous and vexatious and an abuse of the process of the court. The background facts of the case are as follows. The plaintiff and the defendant had known each other in the late 1980s and became romantically involved sometime in the year

1992. Thereafter the defendant moved in to live with the plaintiff in a rented house at No. 9, Jalan 21/28, Sea Park, Petaling Jaya together with both children from the plaintiff's and the defendant's previous marriages and the plaintiff's mother who was suffering from cancer of the brain.

[2] In the late 1990s the plaintiff had inherited about RM2,064,437.90 from the estate of his deceased grandfather at which point of time when the inheritance was about to be distributed, the plaintiff was an undischarged bankrupt. Upon the plaintiff's instructions RM1,032,218.95 was credited into the account of the defendant and with this money three (3) properties were purchased as follows which were all registered under the name of the defendant:

1. House No. 57 Jalan SS 21/38, Damansara Utama, 47400 Petaling Jaya (Damansara House);

2. House No. 9 Jalan 21/28, Seapark, 46300 Petaling Jaya (Setapak House);

3. Honda City 1.5L car bearing Registration No. BFS 43019 (the car),

(hereinafter collectively referred to as "the properties"). The plaintiff and the defendant later live in the Damansara House and the Setapak House was rented out whereby the rental was utilized for their daily and household expenses. With the money the defendant had also purchased unit trusts from the Mayban Unit Trust Fund which unit trusts were later sold and part of the sale proceeds were given to the plaintiff. Sometime in 2005 the defendant walked out on the plaintiff and the plaintiff is now claiming against the defendant as follows:

(a) deklarasi bahawa Defendan memegang harta pertama, harta kedua dan harta ketiga berdasarkan amanah berbangkit (resulting trust) bagi pihak Plaintif keseluruhan;

(b) deklarasi bahawa harta pertama, harta kedua dan harta ketiga adalah aset hasil keluarga dan Defendan memegang secara amanah bagi pihak Plaintif dan Defendan secara samarata;

(c) deklarasi bahawa harta pertama, harta kedua dan harta ketiga telah diperolehi di bawah pengaruh tidak patut (undue influence) oleh Defendan ke atas Plaintif;

A (d) perintah untuk menghalang Defendan menjual harta pertama, harta kedua dan harta ketiga sehingga penyelesaian perbicaraan tindakan ini dan/atau hasil jualan atas harta pertama dibayar dalam Mahkamah sehingga perintah selanjutnya oleh Mahkamah Mulia ini;

B (e) seterusnya harta pertama dan harta kedua dipindahmilik kepada Plaintif keseluruhan dan/atau separuh bahagian mengikut perintah deklarasi;

(f) satu (1) unit kereta Honda City bermodel 1.5(a) keluaran tahun 1999 *vide* no Pendaftaran BFS 4301 atau alternatifnya C jumlah sepenuhnya nilai kereta itu; dan

(g) semua wang yang dikreditkan ke dalam akaun Defendan hasil jualan Mayban Unit Trust Fund;

D (h) kos; dan

(i) lain-lain relif yang difikirkan sesuai oleh Mahkamah Yang Mulia ini.

[3] It is the case of the plaintiff that the defendant holds the E properties on a resulting trust for his benefit and he is therefore a beneficiary under this resulting trust. Alternatively it is the plaintiff's claim that he is entitled to at least a half share of all the jointly acquired properties according to the principles of equal distribution of matrimonial assets as in a married couple. Learned counsel for F the plaintiff cited the case of *Liew Choy Hung v. Fork Kian Seng* [2000] 1 CLJ 369 for the proposition that a man and a woman living together as man and wife but not married to each other, they were to hold the property on a resulting trust for each other proportionate to their contributions to the purchase price.

G **[4]** The defendant's application to strike out the plaintiff's claim is premised on the ground that it is not competent for the plaintiff to maintain against the defendant as the money was given by the plaintiff to her as gift out of love and affection and the properties belong to her as she is the registered owner of the properties. The H defendant further contended that if however the plaintiff gave her the money to overcome his inability due to his bankruptcy status, then the plaintiff had an illegal purpose and the plaintiff cannot now enforce the illegal transaction. Learned counsel for the defendant submitted that the plaintiff's claim which is based on I illegality is liable to be struck out for abuse of process of court.

[5] It was argued by the learned counsel for the plaintiff that there was no strict evidence that the money was a gift from the plaintiff and neither was there any evidence that the plaintiff had intended to deceive anybody. Learned counsel submitted that there are issues here and the court ought to consider distribution of property in equitable manner.

[6] In my view the contemporaneous document lends support to the defendant's contention that the money was given by the plaintiff to circumvent his bankruptcy status. *Vide* para. 8.4 of the plaintiff's affidavit encl. 3, the plaintiff had averred as follows:

> when the accountant/receiver proceeded to distribute the estate fund to all the beneficiaries including my portion of the entitlement, I was informed that the I could not bank in the money because I had been adjudicated a bankrupt. Due to the urgency of the matter I was advised and decided that the best course of action was to place the money into the account of the receiver and thereafter to take steps to resolve the bankruptcy suit. I had spoken to the Defendant on this proposal but she retorted that why I had trusted an outsider but not his own wife. It was under these circumstances and undue influence that I had decided to put the money into her account.

[7] Paragraph 6 of the statement of claim states:

> Atas masalah peribadi wang sebanyak RM2,064,437.90 itu tidak dapat dimasuk ke dalam akaun Plaintif. Justeru itu Plaintif telah memberi arahan-arahan yang spesifik kepada pembeli harta tersebut, Penerima (Receiver) yang mentadbir Estet Low dan peguamcara yang mentadbir Estet Low untuk membayar wang tunai yang sepatutnya diterima oleh Plaintif kepada penerima-penerima seperti berikut:
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> …
>
> i. Puan Ng Yoon Lin (P) (Defendan) RM1,032,218.95

[8] By the plaintiff's own averment, the money was deposited into the account of the defendant to overcome his bankruptcy status. Section 38(1) of the Bankruptcy Act 1967 provides:

> (1) Where a bankrupt has not obtained his discharge:
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> (b) the bankrupt shall once in every six months render to the Director General of Insolvency an account of all moneys and property which have come to his hands for his own use during the preceding six months, and shall

A pay and make over to the Director General of Insolvency so much of the same moneys and property as have not been expended in the necessary expenses of maintenance of himself and his family;

B (ba) nothwithstanding paragraph (b), the bankrupt shall immediately report to the Director General of Insolvency the receipt of any moneys, property or proceeds in any form from property the value of which exceeds five hundred ringgit and which moneys, property or proceeds do not form part of his usual income and the bankrupt C shall, as soon as may be required by the Director General of Insolvency, pay or make over such moneys, property or proceeds to the Director General of Insolvency;

[9] In *Hasmah Abdul Rahman v. Kenny Chua Kien Lam* [2006] 2 D CLJ 1029 Richard Malanjum JCA (as he then was) said at p. 1038:

In respect of the first issue the court found that there was an express trust created. But, in relation to the third issue, it was E 'hopelessly bad' and it was 'illegal from the start'. The reason for finding illegality was not one of statutory illegality but that 'Bank Negara, a public authority, had been deceived and that the primary object of the entire exercise was to practice such deception'. The court accepted the legal principle postulated in the case of *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170 which F held that where 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end, the transaction is tainted with illegality, and is unenforceable'.

So to in the instance case where it was not denied that the statutory declarations affirmed by the respondent and the appellant G contained assertions which, if juxtaposed with the assertions by the respondent in the statement of claim, must have been intended at the material time to mislead SC and KLSE to approve the floating of SBBS on the Second Board.

H Hence, in our view the purported sale of the shares in SBBS from the respondent to the appellant amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end.' There was indeed a deception practised on the relevant approving bodies which were part and parcel of the public administration in this I country. Indeed the respondent had come to seek for assistance from the court with unclean hands. The transaction was therefore tainted with illegality right from the start and thus unenforceable.

> As in *Fusing Construction Sdn Bhd (supra)* the question of the role played by the appellant in the impugned transaction would be quite irrelevant. The appellant was already the registered owner of the shares and she denied that they belonged to a third party much less to the respondent. In any event the consequential that usually follows in any declared illegal transaction is commonly denoted by the maxim 'the loss lies where it falls'. Thus, in this case the rights and bonus issues shares lie where they fall.

[10] In *Tinker v. Tinker* [1970] 2 WLR 331 Lord Denning MR said at p 333:

> So it is plain that the husband had the house put into his wife's name so as to avoid any risk of it being taken by his creditors in case his business was not a success. What is the result in law? In *Gascoigne v. Gascoigne* [1918] 1 KB 223, it was held that when a husband put a house in his wife's name so as to avoid it being taken by his creditors the house belonged to the wife. The husband could not be heard to say that it belonged to him, because he could not be allowed to take advantage of his own dishonesty.
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> … He cannot say that the house is his own and, at one and the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely: or it was conveyed to her as trustee for her husband. It must one or other. The presumption is that it was conveyed to her for her own use: and he does not rebut that presumption by saying that he only did it to defeat his creditors. I think it belongs to her.

[11] I respectfully adopt the above-cited statements in *Hasmah Abdul Rahman* and *Tinker v. Tinker supra.* The court will not aid the plaintiff who clearly had wanted to deceive the Director General of Insolvency in not putting the money into his own account and I do hold that the plaintiff had not rebutted the presumption that the properties were given to the defendant for her own use. In the circumstances I had allowed the defendant's appeal in encl. 19 with costs and the plaintiff's action was consequently struck out.